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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ALFRED G. KING,

Petitioner,

v.

DONALD H. RUMSFELD,
Secretary, U.S. Department of Defense,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this Title VII discriminatory discharge case, the Fourth Circuit affirmed summary judgment, holding that co-worker testimony regarding Plaintiff's job performance should be excluded and, therefore, Plaintiff had not established his prima face case because he had not provided sufficient evidence of satisfactory job performance. With respect to Plaintiff's claim of retaliation, the Fourth Circuit again excluded co-worker testimony offered by Plaintiff and then affirmed summary judgment, holding that Plaintiff had established his prima facie case, but had not presented sufficient evidence of pretext. The questions presented are:

1. Whether the Fourth Circuit correctly held, in conflict with other Circuits, that plaintiffs in discrimination cases cannot use lay testimony of co-workers as evidence of satisfactory job performance to establish their prima facie case.

2. Whether the Fourth Circuit correctly held that plaintiffs in discrimination cases must offer expert opinion testimony to prove both: (a) that a plaintiff's job performance was satisfactory to establish their prima facie case; and (b) that a plaintiff's work was similarly-situated to his co-workers to establish pretext, when no other Circuit nor this Court has so held.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App., *infra*, 1a-28a) in *King v. Rumsfeld* is reported at 328 F.3d 145 (4th Cir. 2003). The opinion of the District Court (App., *infra*, 29a-38a) is unreported.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit, affirming the decision of the United States District Court for the Eastern District of Virginia, was entered on May 8, 2003, with one judge dissenting. App., *infra*, 1a-28a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2002).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 2000e-2(a)(1) (2001):

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

2. 42 U.S.C. § 2000e-3(a) (2001):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an

> employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case presents questions of broad importance regarding the type of evidence a plaintiff in a Title VII discrimination and retaliation case is permitted or required to use to survive summary judgment. The Fourth Circuit has, in effect, made it impossible for a plaintiff in a discrimination or retaliation case to establish his prima face case and to establish pretext.

In this case, both the District Court and the Fourth Circuit, in granting and affirming summary judgment in Defendant's favor on Plaintiff's discrimination claims, excluded Plaintiff's evidence of his satisfactory job performance, which consisted of the testimony of five co-worker teachers regarding the quality of various aspects of Plaintiff's job performance. The Fourth Circuit held that *all* lay co-worker testimony is irrelevant and therefore cannot be used by a plaintiff in a discrimination case to establish the prima facie requirement that his job performance is satisfactory. App., *infra*, 6a. The Fourth Circuit further held

that, absent the defendant conceding a plaintiff's job performance was satisfactory, and absent the defendant giving the plaintiff positive performance reviews in the past, the only evidence a plaintiff can use to establish the prima facie element of satisfactory job performance is qualified *expert* opinion testimony as to: (a) the employer's legitimate job performance expectations; and (b) analysis and evaluation of the plaintiff's performance in light of those expectations. App., *infra*, 6a-7a. After excluding Plaintiff's evidence in this case, the District Court and the Fourth Circuit held that Plaintiff had not met his prima facie case because he could not prove his job performance was satisfactory. App., *infra*, 7a-8a. As a result, neither court reached the pretext issue on Plaintiff's discrimination claims. App., *infra*, 8a, 35a, 37a.

The Fourth Circuit also has made it more difficult to establish pretext in a Title VII retaliation case. In this case, the Fourth Circuit held, in affirming the District Court's entry of summary judgment in favor of Defendant, that Plaintiff had met his prima facie retaliation case, but had not established pretext sufficient to survive summary judgment. App., *infra*, 9a. The Fourth Circuit held that in order for a plaintiff to prove that he was similarly situated to his co-workers in terms of his job performance, so as to rebut a defendant's allegation of his poor performance, a plaintiff must proffer an expert opinion, based on reasoned analysis, as to how the plaintiff and the similarly situated employees were performing and as to how their performances measured against one another. App., *infra*, 14a. Because the Plaintiff did not offer such expert opinion testimony, the Fourth Circuit held that Plaintiff had not presented sufficient evidence of pretext to survive summary judgment. App., *infra*, 14a-16a.

Factual Background

Plaintiff, Alfred G. King, a 52-year-old African American male, was terminated from his employment by the Defendant, Donald H. Rumsfeld, Secretary, United States Department of Defense. Plaintiff filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"), for race discrimination, sex discrimination, and retaliation for complaining of discrimination. 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 2000e-3(a). Defendant filed a motion for summary judgment on all three claims. The District Court granted Defendant's motion for summary judgment on February 21, 2002. App., *infra*, 29a-38a. Plaintiff appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. On May 8, 2003, the Court of Appeals, with one judge dissenting, issued an opinion affirming the District Court's decision. App., *infra*, 1a-28a.

Plaintiff was terminated from his position as a civilian 8th and 9th grade math and science teacher at Ernest J. King Elementary/High School ("School") in Sasebo, Japan (a Department of Defense Dependent School) on May 29, 1997, after complaining of discriminatory treatment by the acting principal, Douglas Carlson.[1] Plaintiff was supervised by principal Thomas Whitaker, Caucasian, during the fall semester, August 1996 through mid-December 1996, and then by acting principal Douglas Carlson, Caucasian, from January 6, 1997 to April 4, 1997, at which time Whitaker returned as principal for the remainder of the spring semester. Whitaker

1. In 1996, when Plaintiff was hired by the Defendant, he had Bachelors and Masters degrees in education. Plaintiff had teaching certificates from both Illinois and Missouri, and he had a combined 10 years of middle school and high school teaching experience.

had actual knowledge of Plaintiff's EEO complaint prior to terminating him. Of the 52 employees at the School, only four were African American, and Plaintiff was the only African American male.

The Department of Defense Office of Complaint Investigation ("OCI") investigated Plaintiff's EEO complaint of discrimination. As part of the OCI investigation, statements were taken from at least 14 witnesses, including five teachers who were co-workers of Plaintiff. The OCI concluded that

> [t]he reasons articulated by [Defendant] for terminating [Plaintiff] are not worthy of belief, and the record supports the conclusion that these reasons are a likely pretext for race discrimination. [Plaintiff] was treated disparately from a similarly situated employee because of his race, and the action taken was motivated by discriminatory animus.

The OCI also found that Plaintiff's claim of retaliation was valid.

Prior to his departure on medical leave in December 1996, principal Whitaker had no significant concerns regarding Plaintiff's performance and no intention of terminating him. Plaintiff's problems at the School began upon acting principal Carlson's arrival at the School.

Donna Fontenot, a Caucasian female substitute teacher at the School, testified that when she substituted for Plaintiff on February 7, 1997, only one month after Carlson had been at the School, Carlson ordered and pressured her into writing false derogatory comments about Plaintiff and his lesson

plans in her substitute teacher's report. Fontenot testified that she felt "threatened" by Carlson and believed if she did not do as Carlson directed, Carlson would not call her to substitute teach at the school anymore. Fontenot testified that Carlson told her she was not to repeat to anyone what he was telling her to do, that it was in total confidence. After the February 7, 1997 incident with Carlson, Fontenot called Plaintiff at home that night and told him about it.

Fontenot further testified that whenever she substituted for Plaintiff, Carlson constantly watched her in Plaintiff's classroom, but Carlson did not observe her when she substituted for any other teachers. Fontenot testified that every day she substituted for Plaintiff she had to produce the lesson plans Plaintiff left for her and tell Carlson what she did. Fontenot testified that she "had never been asked to produce lesson plans for any other teacher." Two other regular teachers also testified that no other teacher who had a substitute had to show their lesson plans to Carlson or Whitaker.

Based upon her education and experience as a teacher, Fontenot testified that Plaintiff's lesson plans were easy to follow, not unusual, and within the standards of what other teachers left for her. Fontenot had substituted for other new white teachers that same year, and testified their substitute lesson plans were not different from Plaintiff's.

The OCI investigator showed Dixie Shepherd, Wendy Okamato, and Trulene Ivey, three of the teachers at the School, Plaintiff's lesson plans that were cited as unsatisfactory by Carlson. Shepherd testified that her own lesson plans "were far less complete," and that Plaintiff's plans were "far more detailed" than her lesson plans.

Okamato testified that based upon her experience teaching for five years, Plaintiff's lesson plans overall were very good. Ivey stated, based on her experience, Plaintiff's lesson plans were complete and the content was clear. Laurel O'Brien, another teacher at the School, testified that Plaintiff's lesson plans were similar to her own lesson plans and there was nothing uncommon about them. At the request of the OCI investigator, Sara Porter, principal of the School beginning in the fall of 1997, reviewed Plaintiff's lesson plans that were criticized by Carlson and testified they were not deficient.

All five of the co-worker teachers testified consistently that they witnessed Carlson harass Plaintiff, that they perceived that Carlson was "out to get" him, and that it was in part because Plaintiff was a black male. One teacher described it as a "witch hunt." The teachers testified that Carlson singled-out Plaintiff and did not treat other teachers, including other first-year probationary teachers, the same way he treated Plaintiff. O'Brien testified Plaintiff was unfairly "being judged [by Carlson] on a different standard [than] the other new teachers." The teachers stated that Carlson's scrutiny of Plaintiff was unusually intense and personal and, based upon their observations of Plaintiff's teaching, unwarranted.

Several of the teachers directly observed Plaintiff teaching and each testified they did not notice anything unusual or deficient about Plaintiff's teaching methods. Although one of Carlson's complaints about Plaintiff was that he used profanity in the classroom or around the students, three teachers testified they had never witnessed this. Plaintiff denied swearing in front of students.

When Plaintiff told Carlson he th ght Carlson's actions were discriminatory and he was see ng EEO counseling, Carlson replied, "That's what you people always say when you screw up." Plaintiff believed him to be referring to black people.

Carlson originally arranged to terminate Plaintiff at the end of March 1997. However, Nancy Bresell, the Japan District Superintendent at that time, stopped the termination and indicated she wanted Whitaker to handle the situation when he returned from medical leave in April 1997.

In 1997, Sharon Dial was the Director of the Sasebo Campus of the Navy Education and Training Professional Development and Technology Center. Dial testified that in March 1997, Plaintiff approached her and said he was being accused of not properly teaching his students and being abusive in the classroom. Plaintiff said he was told his students were not learning because of his instruction. Dial testified that Plaintiff was very concerned about these allegations and asked her if she would conduct a survey in all of his classes to determine whether these accusations were valid. Dial discussed this with Carlson and he gave her permission to conduct the survey. Dial conducted the survey of Plaintiff's classes on a day when Plaintiff was not present.

Dial used an anonymous written survey that was not designed to specifically evaluate how the students felt about Plaintiff, but would generally draw out the adequacy of the instruction and instructor. Dial did not tell the students she was administering the survey for the purpose of evaluating Plaintiff. Dial's results of the survey indicated:

> [T]he class atmosphere was good, but the rooms were considered noisy. The books that they used

> were okay and there was no problem with the instruction, lesson plans, or the teacher. [There] was no indication from the survey results that the students felt their teacher was abusive.

Dial asked Carlson if he wanted to see the results of the survey and he said he did not, which surprised her.

Chief Petty Officer, Dewayne E. Cook, an African American male, who was stationed at the naval base in Sasebo, testified that he volunteered to help Plaintiff's math class on a woodworking project designed to help the students learn angles and how to measure things. Cook testified that in the process of doing this, he met Carlson and, giving two specific examples, testified that Carlson treated him in a hostile, discriminatory manner. Cook was so bothered by Carlson's demeanor he even brought the matter to the Command Master Chief's attention. Cook discussed his experiences with Carlson with other Chiefs on the ship, who are white, and they did not have similar problems. Cook was so offended he even withdrew his help from the project because he did not want to deal with Carlson. Another black male, Efrain Barrera, the housing director for the naval base, testified that Carlson was rude and obnoxious when he interacted with him at the School.

Richard Moore, a Caucasian male, was a first-year probationary teacher in school year 1996/1997 at the School. During the 1996/1997 school year, Whitaker received complaints regarding Moore. Lieutenant Commander Robert Inaba complained that Moore was inappropriately touching students by tickling, poking or jabbing them, and that Moore had done this to his son. Inaba named several other students and parents who indicated that children had been jabbed or

poked by Moore. Inaba was also upset that Moore had embarrassed his son and another student by asking them in front of their classmates if they had taken their medicine. Whitaker told Inaba he had talked with Moore and was satisfied that Moore would not do these things any more. Whitaker testified, however, that he did not remember doing any monitoring to determine if Moore stopped his actions. Inaba indicated he did not share this view, that Moore had not stopped the offensive conduct, so Inaba relayed his concerns in writing to the District Superintendent's Office.

Whitaker acknowledged that three parents, Inaba, a parent who worked for Inaba, and Mary Dame, a parent and the art teacher at the School, complained that Moore had been tickling 7th and 8th grade students in his class and poking them in the sides. Whitaker stated that Dame actually went to Family Advocacy about it. Whitaker testified that he also talked to two or three students who verified the poking and tickling incidents by Moore.

Whitaker stated that he counseled Moore on it and told him it was not appropriate behavior. Whitaker took no further action and did not issue a letter nor document the events in writing in Moore's personnel file. Whitaker testified that he did not specifically note this in Moore's performance appraisal, because he "didn't think it was all that significant."

Plaintiff was fired by Whitaker on May 29, 1997. Whitaker testified that he consulted with Carlson and relied in part on Carlson's reports in making his decision to terminate Plaintiff.

REASONS FOR GRANTING THE PETITION

1. Whether the Fourth Circuit correctly held, in conflict with other Circuits, that plaintiffs in discrimination cases cannot use lay testimony of co-workers as evidence of satisfactory job performance to establish their prima facie case.

In order to establish a prima facie case of discriminatory discharge on the basis of race (or sex), the employee must show: (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory;[2] (3) in spite of his qualifications and performance, he was fired; and (4) the position remained open to similarly qualified applicants after his dismissal. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 (4th Cir. 1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); 42 U.S.C. § 2000e-2(a)(1) (2001). "*The burden of establishing a prima facie case . . . is not onerous.*"

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2. Plaintiff disputes that the Fourth Circuit even articulated the second element of the prima facie case correctly. *See* App., *infra*, 5a; *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999) (holding that the second element is: whether at the time of the adverse employment action the employee was performing at a level that met his employer's legitimate job performance expectations). This Court, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), held that the second element is only: whether plaintiff was qualified for the job. *See Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992) (whether plaintiff was qualified for the job that was held); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1315 (10th Cir. 1999) (whether plaintiff was qualified for the position at issue); *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1359-60 (11th Cir. 1999) (whether plaintiff was qualified to do the job). For purposes of this petition, however, Plaintiff will assume the Fourth Circuit correctly set forth the elements of the prima facie case.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (emphasis added); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989).[3]

The Fourth Circuit held in this case that *all* lay co-worker testimony is irrelevant and therefore cannot be used by a plaintiff to establish the prima facie requirement of satisfactory job performance. App., *infra*, 5a-6a. As a result, according to the Fourth Circuit, because Plaintiff relied on lay co-worker testimony to establish this element of his prima facie case, Plaintiff did not raise a genuine issue of material fact as to whether his job performance met Defendant's legitimate job performance expectations in order to survive summary judgment. App., *infra*, 5a-8a. The Fourth Circuit's refusal to even consider Plaintiff's co-workers' testimony is in direct conflict with this Court's decision in *Burdine*, and with decisions in the Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The Fourth Circuit's holding that a plaintiff cannot use his own testimony or the testimony of his co-workers to prove this element of his prima facie case is in direct conflict with other Circuits, and this Court's decisions, which have allowed lay co-worker testimony and/or a plaintiff's own testimony to establish or refute satisfactory job performance in the

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3. Once the employee proves a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *McDonnell Douglas*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 254. If the employer meets this obligation of articulating a reason, the employee must then carry the ultimate burden of persuasion by presenting evidence to show that the employer's reason is not credible and is a mere pretext for discrimination. *Burdine*, 450 U.S. at 253.

context of a plaintiff's prima facie case. The Seventh Circuit has held that, when made in the context of a prima facie case, satisfactory job performance "may be based solely upon the employee's testimony concerning the quality of his work." *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1114 n.35 (7th Cir. 1992), quoting *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 923 n.6 (7th Cir. 1988) (citing *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 512 (7th Cir. 1986)); *see also*, *Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 786 (7th Cir. 1979); (plaintiff satisfied her prima facie case by presenting the testimony of several co-employees that she performed as foreman better than her successor); *Campbell v. Dwyer*, 31 Fed. Appx. 916, 918-19 (7th Cir. 2002) (affidavits of co-workers asserting that plaintiff was an exemplary welder, in addition to positive feedback from plaintiff's supervisor during the first two weeks of his employment, and plaintiff's denial of culpability for the mistakes the employer alleged plaintiff made, were sufficient evidence to establish the satisfactory job performance element of plaintiff's prima facie case).

Similarly, the Eighth Circuit has held that a prima facie showing can be made through credible evidence that the plaintiff was qualified for the position even if the evidence is disputed by the employer, and this burden may be met through plaintiff's own testimony and that of co-workers who were in a position to know plaintiff's qualifications. *Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612, 615-16 (8th Cir. 1997) (testimony of someone who worked closely with plaintiff in her employment capacity, even though not her supervisor or co-worker, is relevant to the issue of whether she was qualified for the promotion).

Likewise, the Tenth Circuit has held that a plaintiff may make out a prima facie case of discriminatory discharge by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory even when disputed by her employer, or by evidence that she had held her position for a significant period of time. *MacDonald v. Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir. 1991); *see also*, *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1316 n.11 (10th Cir. 1999) (holding that plaintiff had met her prima facie burden by showing, through credible evidence that included plaintiff's own testimony, that she was minimally qualified for the position she sought, even though the defendant disputed that evidence); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992) (plaintiff met her prima facie burden of showing she was qualified for the position through her own testimony and that of co-workers who were in a position to know the plaintiff's qualifications).

In the *MacDonald* case from the Tenth Circuit, the District Court had held that the plaintiffs had not established their prima facie case because they had not presented sufficient evidence that their job performance was satisfactory. *MacDonald*, 941 F.2d at 1119. The District Court relied on the employer's proffered reasons for discharge and required plaintiffs to disprove the reasons given for their discharge in order to establish a prima facie case. *MacDonald*, 941 F.2d at 1119. The Tenth Circuit disagreed with the District Court's analysis and holding, stating:

> [C]oncluding that the MacDonalds did not establish a prima facie case based on the reasons for their discharge raises serious problems under the *McDonnell Douglas* analysis, which mandates

> a full and fair opportunity for a plaintiff to demonstrate pretext. Short-circuiting the analysis at the prima facie stage frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor; if a plaintiff's failure to overcome the reasons offered by the defendant for discharge defeats the plaintiff's prima facie case, the court is then not required to consider plaintiff's evidence on these critical issues.
>
> Although circuits have addressed this problem in various ways, the common thread running through all the decisions is the courts' refusal to consider a defendant's proffered reasons for discharge in assessing the existence of a prima facie case.

MacDonald, 941 F.2d at 1119.

The Tenth Circuit in *MacDonald* then went on to discuss and cite for support cases from the Third Circuit (*Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 54 (3d Cir. 1990) (rejecting a defendant's attempt to defeat a plaintiff's prima facie case by articulating its reasons for the discharge)), the Fifth Circuit (*Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988) (a discharged plaintiff can establish his prima facie case by showing he continued to possess the necessary qualifications for his job at the time of discharge)),[4]

4. *See also Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992) (in discrimination case where defendant argued plaintiff's job performance unsatisfactory, court considered the *defendant's* presentation of testimony of "[o]ther witnesses, familiar with [plaintiff's] work").

the Seventh Circuit (*Williams*, 856 F.2d at 923 n.6), and the Eleventh Circuit (*Young v. General Foods Corp.*, 840 F.2d 825, 829 n.3 (11th Cir. 1988)). *MacDonald*, 941 F.2d at 1119-21.

After conducting this analysis, the Tenth Circuit concluded and held that

> a plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant period of time.

MacDonald, 941 F.2d at 1121 (citations omitted).

The Eleventh Circuit has held that in discriminatory discharge cases a plaintiff who has had a long tenure with the employer need not even satisfy the prima facie prong of satisfactory job performance. In such situations, allegations of poor performance against plaintiffs discharged from long-held positions may be properly considered *only* when a court evaluates pretext. *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999).

Thus, the Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have explicitly relied on lay co-worker testimony and evidence other than the employer's opinion of the plaintiff's job performance in deciding whether an employee's job performance was satisfactory for purposes of establishing the employee's prima facie case. In contrast,

the Fourth Circuit held that "we have long rejected the relevance of [co-worker] testimony and held it to be insufficient to establish the [second] required element [(satisfactory job performance)] of a prima facie discrimination case." App., *infra*, 6a. This holding is in direct conflict with these Circuits that have properly followed *Burdine* and allowed lay co-worker testimony for the purpose of establishing a plaintiff's prima facie case.

If Plaintiff had brought his claim in the Tenth Circuit, he clearly met the prima facie element of satisfactory job performance. The Tenth Circuit has held that

> a plaintiff may make out a prima facie case of discriminatory discharge by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant period of time.

MacDonald, 941 F.2d at 1121. Plaintiff in this case met that element by showing that he still held all of the objective teaching qualifications he had when he was hired by the Defendant. Plaintiff's own testimony was that his work was satisfactory, even though this was disputed by Defendant. Therefore, if Plaintiff were in the Tenth Circuit, he would have met his prima facie case.

The Fourth Circuit's holding makes it impossible for an employee in a discrimination case to prove the satisfactory job performance element of his prima facie case, unless the employer concedes that element or unless the employer has previously given the employee positive performance reviews. The practical effect of the Fourth Circuit's incorrect standard is that employees

will not succeed on claims of discrimination unless the employer concedes the employee's job performance was satisfactory. This is directly contrary to this Court's holding in *Burdine* that the burden of proving the prima facie case is light. *Burdine*, 450 U.S. at 253. Moreover, absent his supervisor, who else but peers or co-workers or outside observers are able to testify regarding the issue of a plaintiff's job performance? In this case, the testimony regarding Plaintiff's job performance from other experienced teachers is entirely relevant. These teachers observed first-hand Plaintiff's interaction with his students, observed his performance in and out of the classroom, reviewed his lesson plans, and observed his teaching during the same period of time that Carlson and Whitaker, Plaintiff's supervisors, were allegedly judging Plaintiff's performance. The qualifications, education, and job experience of Plaintiff's witnesses (other teachers at the School) and Defendant's witnesses (principals Carlson and Whitaker) may be factors for a trier of fact to consider in determining the *weight* to be accorded the respective witnesses' testimony, but the Fourth Circuit was in error in holding that the testimony of *all* co-worker witnesses is *irrelevant* on the issue of a plaintiff's job performance.[5] This is particularly true at the prima facie stage of the analysis.

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5. Federal Rule of Evidence 401 states that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F.R.E. 401; *see Lyoch*, 139 F.3d at 615-16. The Eighth Circuit in *Lyoch*, citing Rule 401 of the Federal Rules of Evidence, held that plaintiff's affidavit from someone she worked closely with, even if it was not a co-worker or supervisor, was relevant to the issue of whether she was qualified for the promotion. The Eighth Circuit stated:

> Certainly, the testimony of someone who worked closely with [plaintiff] in her employment capacity would

(Cont'd)

The Fourth Circuit completely disregarded this Court's holding in *Burdine* that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253; *Watson*, 487 U.S. at 986; *Patterson*, 491 U.S. at 186. "The *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.'" *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The Fourth Circuit's decision is in conflict with other Circuits which allow both plaintiffs, as well as defendants, to use lay testimony from co-workers and the testimony of outside observers as evidence regarding the quality of a plaintiff's job performance to establish (or refute) a plaintiff's prima facie case. This Court should accept this case for review to resolve this conflict among the Circuits and to ensure a uniform standard among the Circuits for all plaintiffs bringing discrimination cases.

(Cont'd)

> be relevant to the issue of whether she was qualified for promotion. The trier of fact is free to consider such evidence less persuasive than if it came from someone at [defendant] empowered to make decisions on promotion, *but courts considering motions for summary judgment may not weigh evidence in this way.*

Lyoch, 139 F.3d at 616 (emphasis added).

2. Whether the Fourth Circuit correctly held that plaintiffs in discrimination cases must offer expert opinion testimony to prove both: (a) that a plaintiff's job performance was satisfactory to establish their prima facie case; and (b) that a plaintiff's work was similarly-situated to his co-workers to establish pretext, when no other Circuit nor this Court has so held.

A. Prima Facie Case – Discrimination

The Fourth Circuit held that, absent the employer conceding a plaintiff's job performance was satisfactory, and absent evidence that the employer previously gave the employee positive performance reviews, the only way a plaintiff can establish the prima facie element of satisfactory job performance is "to offer qualified expert opinion testimony as to (1) [the employer's] legitimate job performance expectations and (2) analysis and evaluation of [plaintiff's] performance in light of those expectations." App., *infra*, 7a. Plaintiff is not aware of any other Circuits that have required a plaintiff to use expert testimony to establish the element of satisfactory job performance as part of a plaintiff's prima facie case in an employment discrimination suit. The holding of the Fourth Circuit is unprecedented. The Fourth Circuit cites no legal authority for its holding that Plaintiff must establish the satisfactory job performance element of his prima facie case through expert testimony.

The practical effect of the Fourth Circuit's erroneous standard is that no employee will ever succeed on a claim of discrimination unless the employer concedes the employee's job performance was satisfactory. A plaintiff will never be able to retain an expert to testify as to: (1) the employer's

legitimate job performance expectations; nor (2) analyze and evaluate a plaintiff's performance in light of those expectations. In discriminatory discharge cases, the plaintiff will not be in a position to hire an expert witness until he is in the middle of litigation. A plaintiff may not even know he needs an expert until he is fired. At that point in time, the expert will not be able to personally observe plaintiff during the period of time plaintiff was actually working for the employer. The expert will have to rely on what others tell him or her regarding plaintiff's performance. (Ironically, this is exactly the testimony a plaintiff's lay co-worker witnesses would give, but which the Fourth Circuit has also rejected as irrelevant.) Some or possibly most of the employees with whom plaintiff worked may no longer be employed by the employer. Therefore, in analyzing and evaluating plaintiff's performance in light of the employer's job performance expectations, the expert will not be in the same position as plaintiff's supervisor. The expert will not have the opportunity to evaluate first-hand whether the employer's job performance expectations at the time of plaintiff's termination were legitimate, and the expert will not be able to actually observe plaintiff's performance during that period of time, so the expert's analysis and evaluation will be limited to what is told to him by others.

Moreover, the Fourth Circuit stated that Plaintiff had not proffered his teacher-witnesses as experts. This is incorrect. This expert witness issue was not raised by the District Court, nor was it raised by Defendant on appeal to the Fourth Circuit so it was not briefed by either party. The issue first arose at oral argument and was raised by the Court itself. Plaintiff had, in fact, in response to Defendant's interrogatories, designated his teacher-witnesses as non-retained experts and this was part of the record on appeal before the Fourth Circuit:

INTERROGATORY NO. 6:
[Expert Witness Designation]

If you have employed an expert other than your attorney to act on your behalf in any matter pertaining to this action, with respect to any expert witness you intend to call at trial, identify (per the Instructions, *supra*) the expert, the area of his or her expertise, the subject matter on which each such expert is expected to testify, the substance of the facts and opinions to which each expert is expected to testify, and a summary of the grounds for each opinion of each expert.

ANSWER: Dixie Shepherd, Wendy Okamato, Truelene Ivey, Donna Fontenot, Sara Porter, Laurel O'Brien, Richard Moore, Sharon Dial, Alfred G. King, John Bailey, Jr., Jim Thomson, George Edwards, and Larry Hutchins. The last known addresses of these individuals are set forth in my answer to interrogatory 7. The foregoing individuals have not been specifically retained as expert witnesses, but they may be called to testify as expert witnesses. Their area of expertise is teaching or education. The subject matter on which they may be expected to testify is the quality of Mr. King's lesson plans, grade books and reports, classroom rules, and any other of his written work, as well as his teaching abilities, as compared to other teachers at [the School]. The grounds or basis for their opinions would be their experience and education in the teaching field, and/or their experience as a teacher or administrator at [the School], and/or their

> observations of Mr. King and his work, and/or a survey conducted of Mr. King's students. Plaintiff reserves the right to identify other experts and supplement the answer to this interrogatory.

Consequently, to the extent there was any issue as to whether Plaintiff's witnesses were technically designated as experts for purposes of Federal Rule of Evidence 702, Plaintiff met this requirement and the Fourth Circuit was in error.

Moreover, the Fourth Circuit did not require the Defendant to produce expert witnesses or qualify its witnesses, Carlson and Whitaker, as experts before allowing them to render their opinions about Plaintiff's job performance. Thus, the Fourth Circuit set a double-standard, requiring plaintiffs to qualify their witnesses as experts regarding a plaintiff's job performance, but not requiring defendants to do so.

Again, Plaintiff is not aware of any other Circuit that requires this standard of proof for a plaintiff to prove his prima facie case. Indeed, such a requirement is in direct contravention of this Court's mandate from *Burdine* that the burden of proving a prima facie case is not onerous. *Burdine*, 450 U.S. at 253. Because the Fourth Circuit held that Plaintiff had not proved his prima facie case, the Court did not even consider Plaintiff's evidence of pretext. Therefore, the Fourth Circuit violated long-established precedent of this Court and plainly erred. This issue is one of national importance, affecting the standard of proof required in Title VII cases, and it has not been previously addressed by this Court.

B. Pretext – Retaliation

In order to establish a prima facie case of retaliation, an employee must show: (1) he engaged in a protected activity; (2) the employer acted adversely against the employee; and (3) the protected activity was causally connected to the employee's adverse action. *Williams*, 871 F.2d at 457; 42 U.S.C. § 2000e-3(a) (2001). Once the employee proves a prima facie case, the burden then shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment decision. *McDonnell Douglas*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 254. If the employer articulates such a reason, then the employee carries the ultimate burden of persuasion to show that the employer's reason is a mere pretext for retaliation. *Burdine*, 450 U.S. at 254.

The Fourth Circuit held that although Plaintiff had made out a prima facie case of retaliation, the Defendant had proffered a legitimate, non-retaliatory discharge motive – Plaintiff did not meet the Defendant's job performance expectations. App., *infra*, 9a-10a. Plaintiff next had the burden to show that Defendant's legitimate non-retaliatory explanation for Plaintiff's termination was mere pretext, not worthy of credence. App., *infra*, 10a.

One method for Plaintiff to rebut Defendant's asserted reason for taking the adverse action (firing him for poor performance), was to show that Plaintiff was being treated differently than his similarly situated co-workers in terms of his job performance. In order to prove this, Plaintiff presented lay witnesses who made direct observations and comparisons. Plaintiff had credible evidence from co-workers that his performance and quality of work was similar to co-workers who did not engage in protected activity (i.e., did not bring

charges of discrimination). The Fourth Circuit, however, required Plaintiff to proffer "an expert to form an opinion based on reasoned analysis as to how [Plaintiff] and the other teachers were performing and as to how their performances measured against one another." App., *infra*, 14a. The Fourth Circuit cites no law to support this standard. Plaintiff is not aware of any other Circuit which has required expert testimony regarding pretext in a retaliatory discharge case.

The Fourth Circuit's expert witness requirement permitted it to ignore Plaintiff's evidence showing Defendant's legitimate non-retaliatory reason was pretextual and a lie. Plaintiff's evidence of pretext demonstrated he was evaluated differently than similarly situated teachers, and subsequently fired when they were not. Thus, Plaintiff's evidence showed that Defendant's alleged nonretaliatory reason for terminating Plaintiff was not the *real* reason Plaintiff was terminated. *See, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-48 (2000).

As the dissent noted, Plaintiff should not have been required to present expert testimony to prove pretext, because Plaintiff was not trying to show at this stage that his work was meritorious but, rather, that Defendant was lying when it said his job performance was so poor it merited firing him. App., *infra*, 26a-28a. The dissent states:

> King has adduced substantial evidence from his fellow teachers to the effect that their lesson plans were similar. Each of these teachers and substitute teachers had ample personal knowledge of the subject matter. . . . Ultimately King's proffer of comparative testimony goes not to the merits of the subject work-product, nor to the legitimate

> expectations of an elementary school supervisor, but simply seeks to establish the similarity of two items of evidence, both of which are personally familiar to the proposed opinant.

App., *infra*, 26a-28a.[6]

The Fourth Circuit's holding is without precedent. If left to stand, plaintiffs in discrimination and retaliation cases in the Fourth Circuit will be left subject to an erroneous standard of proof *just to establish a genuine issue of material fact to survive a summary judgment*. Plaintiffs in other Circuits are not subject to this standard. This issue is one of national importance because it creates a heavy burden for civil rights plaintiffs that runs counter to the true remedial purposes of Title VII. Moreover, this issue has not been previously addressed by this Court.

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6. In addition, the dissent noted that since the pretext issue was being raised on a motion for summary judgment, the majority was also impermissibly weighing the evidence and evaluating the credibility of the witnesses. App., *infra*, 18a-19a, 26a-28a; *see Reeves*, 530 U.S. at 150-52 (on a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence; the court may not disregard critical evidence favorable to plaintiff, fail to draw all reasonable inferences in favor of plaintiff, or discount plaintiff's evidence).

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED MAY 8, 2003

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1313

ALFRED G. KING,

Plaintiff-Appellant,

v.

DONALD RUMSFELD,
Secretary, United States Department of Defense,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-01-1152-A)

Argued: February 24, 2003

Decided: May 8, 2003

OPINION

LUTTIG, Circuit Judge:

Appellant Alfred G. King appeals the district court's order granting summary judgment in favor of his former employer, the United States Secretary of Defense, on his race

and sex discrimination and retaliation claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17. Because King has not presented a prima facie case as to his race and sex discrimination claims and because he has not overcome his employer's asserted legitimate motive in terminating him with respect to his retaliation claims, we affirm.

I.

The relevant facts of this case are straightforward. In 1996, King, a black man, was hired as a teacher by the Department of Defense (DOD) Dependent Schools, subject to a two-year probationary period. During the time of his probationary employment, King was reprimanded and counseled on multiple occasions by different superiors for using profanity around the students and for belittling them. King's first supervisor, Thomas Whitaker, was the first to take notice of and to confront King about this behavior. When Whitaker took medical leave, his successor, Douglas Carlson, heard similar reports of King's unsuitable conduct and similarly reprimanded and counseled King.

Because King was a probationary teacher and because his conduct concerned Carlson, Carlson began to review other aspects of King's work, including his lesson planning. Ultimately, Carlson concluded that King's job performance was inadequate, as reflected by his lesson planning, among other factors.[1] Carlson shared his conclusion with King and

1. For example, in one particular instance, King left identical worksheets for three different classes at different grade levels when he had to be absent. Carlson concluded that the uniform worksheet for such disparate classes reflected inadequate preparation on King's part.

counseled him as to how he might improve his performance. Following a subsequent performance review — which this time culminated with Carlson telling King he could be terminated based upon his performance — Carlson received notice from the DOD Office of Complaint Investigations that King had filed an Equal Employment Opportunity (EEO) complaint against him.

Before Carlson took any definitive action with respect to King's employment, Whitaker returned from his medical leave. Upon returning, Whitaker met with Carlson to discuss King's performance. Whitaker reviewed the many notes Carlson kept of his conferences with King and of King's job performance. Whitaker then met with King on two occasions and asked King to explain his side of the events that occurred while Whitaker was away. Following these meetings, Whitaker decided to evaluate King himself before making a decision regarding his termination. Whitaker observed King's classes on several occasions and talked to several of King's students. Following his own review, Whitaker decided to terminate King prior to the end of his two-year probationary period.

King then brought this action alleging that he was terminated for discriminatory motives and that his termination was a retaliatory action against him for filing an EEO complaint. To support his claim, King proffered evidence (1) that another probationary teacher, a white man, whose conduct had generated complaints from students and parents was not fired;[2] (2) that Carlson picked on him; (3) that a substitute teacher had been

2. The record, however, also discloses that this teacher, who had been asked not to tickle the students after two reported incidents of such, corrected his behavior following reprimand, unlike King.

pressured by Carlson into providing a critical review of King after substituting for him; (4) that upon learning of King's EEO complaint Carlson said to him, "[t]hat's what you people always say when you screw up;" and most importantly, as will quickly become evident, (5) that other teachers at the school considered King's lesson plans not to be substantially different from their own plans.

Upon motion for summary judgment, the district court granted judgment to appellee. The court determined that King's proffer failed to establish a prima facie case of race or sex discrimination because it did not contain evidence that King's job performance was satisfactory at the time of his discharge. The court also determined that King failed to establish a prima facie retaliatory discharge claim.

II.

We review an award of summary judgment *de novo*. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We view the evidence in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Appendix A

A.

To establish a prima facie case of discriminatory discharge, King must show: (1) that he is a member of a protected class; (2) that he suffered from an adverse employment action; (3) that at the time the employer took the adverse employment action he was performing at a level that met his employer's legitimate expectations; and (4) that the position was filled by a similarly qualified applicant outside the protected class. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999). This case turns on King's inability to demonstrate the third factor—that at the time of his discharge he was performing at a level that met appellee's legitimate expectations.

Appellee offered substantial evidence that King was not in fact meeting legitimate job performance expectations, chronicling in detail King's poor performance and his supervisors' numerous concerns. King's response to appellee's evidence is limited to his own claim of satisfactory job performance and to testimony he elicited from his fellow teachers to the effect that his lesson plans were substantially comparable to their own. Neither testimony can sustain a challenge to appellee's proffer that King was not in fact meeting *appellee's* legitimate performance expectations.

King's own testimony, of course, cannot establish a genuine issue as to whether King was meeting appellee's expectations. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996) ("It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." (citations omitted)). Nor can the

fact testimony of King's co-workers that his lesson plans were comparable to theirs establish this genuine issue. Proof that King's performance was comparable to his co-workers' is *not* proof that King's performance met appellee's legitimate job performance expectations. It is *only* proof that his work looked like that of his co-workers, a fact that, without more, does not bear on the critical inquiry.[3] For this reason we have long rejected the relevance of such testimony and held it to be insufficient to establish the third required element of a prima facie discrimination case. *See, e.g., Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000) ("The alleged opinions of Hawkins' co-workers as to the quality of her work are [ ] close to irrelevant." (citation omitted)); *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir. 1998) ("[A]lthough the affidavits put forth by Tinsley document the *fact* that certain co-workers, Bank customers, and attorneys believed Tinsley was doing a good job, they fail to address whether management honestly believed that Tinsley was doing a good job." (emphasis added)).

The irrelevance of King's co-workers *as fact witnesses* does not, as King contends, foreclose employees like him from ever proving a prima facie case of race and sex discrimination. King argues that our rule only allows employees to satisfy the prima facie standard in the unique, and employer-controlled, circumstance where the employer either (1) concedes that the employee was performing satisfactorily at the time of discharge, or (2) has previously given the employee positive performance reviews that establish this third element. But such is not the

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3. That King's co-workers thought his work substantially similar to their own is simply not the smoking gun King believes. By way of example, the co-worker's testimony, taken as fully accurate, might simply reflect that their job performance too was lacking.

case. For King to establish that his work met appellee's legitimate job performance expectations he had only to offer qualified expert opinion testimony as to (1) appellee's legitimate job performance expectations and (2) analysis and evaluation of King's performance in light of those expectations.

It is not inconceivable that a plaintiff's co-workers could qualify as expert witnesses to testify as to their employer's legitimate job performance expectations and as to their own analysis and evaluation of the plaintiff's performance in light of those expectations. But King never proffered his co-workers in this capacity. And, even had the co-workers been so proffered, their testimony never touched on either of these two critical inquiries. King's co-workers' testimony was limited to the fact observation that King's lesson plans looked like theirs, and, arguably, to the fact that *they* believed King's work met appellee's expectations. Since testimony as to the fact that King's work looked like that of his co-workers, or even as to the fact that they believed his work met appellee's expectations, does not establish what expectations appellee could legitimately have, it cannot begin to answer the first step of the inquiry. Nor, obviously, can it answer the second step of the inquiry — an evaluation of King's work under appellee's as-of-yet unidentified legitimate expectations. Failing to address what expectations of King appellee could legitimately maintain and failing to analyze King's work in light of such opined expectations, the co-workers' fact testimony cannot build a prima facie case for King.[4]

4. King's argument is really no more than an argument for the admissibility of expert opinion testimony from unqualified, non-expert witnesses. For, King's conclusion — that the fact that his

(Cont'd)

Appendix A

Because King cannot establish that his job performance satisfied appellee's legitimate expectations, and so cannot establish a prima facie case, his other allegations — that a similarly situated white, probationary teacher was not fired after complaints were raised about him, and that Carlson picked on him, asked a substitute to critique him, and ultimately told him "[t]hat's what you people always say when you screw up" — are irrelevant to the inquiry. These allegations, as King recognizes, go to the issue of whether appellee's explanation of King's discharge is pretextual. But, since King never established a prima facie case as to his discrimination claims, appellee is under no duty to supply an explanation for King's discharge. *See Brinkley*, 180 F.3d at 607 ("*Once the prima facie case is established, the burden shifts to the employer* to articulate a legitimate, nondiscriminatory reason for the adverse employment action." (emphasis added)). Because appellee is freed from having to justify the discharge (with respect to the discrimination claims), King's evidence-in-waiting, prepared to rebut any justification, is of no moment.

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co-workers thought he met appellee's expectations is probative of whether he did meet those expectations — necessarily relies on the implicit assumption that the co-workers' have reliable and admissible (*i.e.*, expert) opinions as to what expectations appellee could legitimately maintain and as to whether analysis of King's work shows satisfactory performance under those expectations.

Appendix A

B.

The district court also concluded that King failed to make out a prima facie case of retaliatory discharge. We disagree. We conclude that King did indeed make out a prima facie case of retaliation. However, appellee offered a legitimate, non-retaliatory motive for King's termination, as to which proffer King has not offered evidence of pretext.

To make out a prima facie case of retaliation, King must show (1) that he engaged in a protected activity; (2) that his employer took an adverse employment action against him; and (3) that a causal connection existed between the protected activity and the asserted adverse action. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1999). Here, King's filing of the EEO complaint was protected activity, and his termination indisputably constituted adverse employment action. Moreover, that his termination came so close upon his filing of the complaint gives rise to a sufficient inference of causation to satisfy the prima facie requirement. *See id.* ("Appellant's proof of a causal connection between the protected activity and her discharge was that she was fired after her employer became aware that she had filed a discrimination charge. While this proof far from conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality.").[5]

5. King's firing came two months and two weeks following Carlson's receipt of notice that King had filed an EEO complaint with DOD's Office of Complaint Investigations. This length of time between Carlson's notice of the complaint and the adverse

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Appellee, however, proffered a legitimate, non-retaliatory discharge motive — that King was not meeting appellee's job performance expectations — after King shifted the burden to it by establishing his prima facie case. *See id.* ("Once this prima facie evidence [of retaliatory discharge] is established, it must be rebutted by legitimate nonretaliatory reasons [.]"). Appellee thus shifted the burden back to King with his proffer. *See Womack v. Munson*, 619 F.2d 1292, 1296 (4th Cir. 1980) (following the employer's proffer of a legitimate, non-retaliatory reason for an adverse employment action the burden of persuasion remains with the plaintiff to prove that the employer's reason is pretext, a cover-up for retaliation).

None of King's various allegations — that a similarly situated white, probationary teacher was not fired after complaints were raised about him, and that Carlson picked on him, asked a substitute to critique him, and ultimately told him "[t]hat's what you people always say when you screw up" — *contradict* appellee's proffered discharge motive.

Nor are they probative in the manner that the dissents suggests. For example, the dissent says:

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employment action is sufficiently long so as to weaken significantly the inference of causation between the two events. Yet, in the context of this particular employment situation, this length of time does not undercut the inference of causation enough to render King's prima facie claim unsuccessful. Here, Carlson and Whitaker committed to ongoing reviews of King's performance that set the end of the academic school year as the natural decision point, thus making likely that any discharge, lawful or unlawful, would come at that time.

Appendix A

> [T]hat Whitaker was aware of reports of ongoing misconduct by Moore — post reprimand . . . establishes a solid basis for the permissible inference . . . that the administrators knew that Moore's misconduct continued beyond reprimand[.]

Post at 16. But, evidence that a parent wrote to the school to complain about this other teacher after that teacher was reprimanded cannot establish that King and that teacher were similarly situated. To establish that King and that teacher were similarly situated, King must proffer evidence that *school administrators believed* that the other teacher had, like King, continued his misconduct beyond reprimand. To prove this, either King must directly proffer evidence of the administrators' beliefs, or he must proffer evidence that the other teacher's misconduct did in fact continue beyond reprimand. Of course, the latter proof form is relevant only insofar as it might make possible the inference that despite the administrators' protestations to the contrary, they did in fact know about the misconduct.

King does not present the first form of proof here — testimony that the administrators believed the two teachers were similarly situated in the relevant respect. The administrators testified they believed the other teacher had ceased his misconduct. King proffered no evidence to contradict their testimony directly. The letter from the vexed parent that the dissent cites does not, and cannot, directly establish that the administrators thought as the parent thought. It establishes only that the administrators were informed as to the parent's thoughts. Indeed, that very letter reports that the administrators disagreed with its author and believed the other teacher had ceased his misconduct.

The second form of proof — proving by inference from the fact that the other teacher's misconduct had continued beyond reprimand that the administrators knew such to be the case — is not met here either. The only evidence King proffers on this score is the same letter as discussed above. King argues, in essence, that the letter proves two different facts: (1) that the teacher did in fact continue his misconduct beyond reprimand; and (2) that the administrators were given knowledge of this fact. It should be readily apparent that until evidence that can establish the fact of continuing misconduct is proffered, the letter cannot establish the second fact. For if there is no proof that the misconduct continued, the letter cannot establish that the administrators were given knowledge that it continued since the foundation of any such knowledge is the actual fact that the misconduct continued.

The letter, however, cannot establish that the misconduct in fact continued. As an initial matter, the letter-writer concedes he is a parent of a child who had *not* been inappropriately touched by the teacher following his reprimand. *See* J.A. at 333-34. Consequently, the aspect of the letter to which King, and the dissent, cling is the hearsay assertion by that parent that another parent's child had been inappropriately touched after the teacher's reprimand. The letter writer claimed to have "learned" of that alleged instance (and most importantly of the time it occurred) via a hearsay report from his son. He did not learn of the incident (and again, most importantly, of the time it occurred) from either the allegedly inappropriately touched child or from the parent of that child. Indeed, the letter-writer notes that in another hearsay conversation with the parent of the allegedly touched child, while the parent of that child confirmed his child had

been "poked," he could not confirm that such had occurred *after* the teacher had been reprimanded. *See* J.A. at 333. Furthermore, and of greatest import, King proffered no evidence either from the student who was allegedly poked after the teacher's reprimand, or from that student's parent. And, we note as well, neither *that* student nor his parents filed a complaint with the school alleging that the student was inappropriately touched following Moore's reprimand. There is thus no reliable, proffered basis on which to conclude that the teacher's misconduct continued past reprimand.

Since the letter cannot establish the fact of continuing misconduct, and since no other evidence was presented to establish this fact, the letter cannot establish that it gave the administrators knowledge of such a fact. With no valid evidentiary basis on which to infer that the administrators knew, despite their denial, that the other teacher's misconduct continued, King cannot establish inferentially that he was similarly situated to that other teacher.

Likewise, the dissent places too much weight on the testimony by Donna Fontenot (a substitute teacher at the school) that *Carlson* asked her to be "critical" of, or make "derogatory comments" about, King's lesson plans in her post-substituting evaluation forms. *See* J.A. at 381. As an initial matter, that an employer asks, or even coerces, a subordinate to evaluate another's work critically is not sufficient on its own to establish evidence of pretext. Employers are entitled to demand that subordinates provide critical reviews of their employees when such are justified by sub-par work. And, even if Carlson's demand of Fontenot is the least bit probative that he harbored an unlawful motive

for firing King and so desired that she provide a pretext under which he could fire him, the fact is that Carlson did not fire King. *Whitaker* fired King *after conducting his own independent investigation* of the matter, and after Carlson had left the school. No evidence links to Whitaker the motive King uses Fontenot's testimony to ascribe to Carlson. Since Carlson did not fire King, and since any motive Carlson had for pressuring Fontenot is not attributable to Whitaker, Fontenot's testimony could only be relevant if the record contained evidence that Fontenot provided reviews of King's work that falsely attributed sub-par performance to him and that King was fired at least partially on that basis. But, the record contains no suggestion at all that the reviews Fontenot provided were in any way inaccurate reviews of King's work.

The dissent also points to King's co-worker testimony as evidence that King was treated differently than similarly situated colleagues. But again, for similar reasons as governed our discussion in section II.A., *cf. infra* pp. 4-7, the opinion of King's colleagues that his work was equivalent to theirs is probative only of the fact that *those* co-workers believed their work was equivalent to his. It is *not* probative of whether King's work *actually* was equivalent to theirs, and thus of whether King *actually* was similarly situated to them. For King to prove that he was similarly situated to his colleagues in terms of his job performance would, in the absence of evidence to that effect from the employer or its job performance reviews, require an expert to form an opinion based on reasoned analysis as to how King and the other teachers were performing and as to how their performances measured against one another. Such is not the stuff of lay, fact testimony. *Compare* Fed. R. Evid. 701 (opinion

testimony by lay witnesses allowed only where that opinion is "rationally based on the perception of the witness," and not where the opinion is based on "specialized knowledge"), *with* Fed. R. Evid. 702 (Testimony by Experts). Thus, just as it would take an expert witness to provide an opinion as to whether any given teacher had met legitimate job performance expectations, as the dissent agrees, *see post* at 13, 17, so too it would take an expert to provide an opinion as to whether any given teacher's work was equivalent to that of another teacher's.

Though the dissent would rely upon *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231 (4th Cir. 1991), to reach the contrary conclusion, that case does not support the dissent. In *Conkwright*, we considered the employment discrimination claims of a worker who was laid off after his employer enacted firm-wide cutbacks by first rating all its employees, and then discharging those on the bottom of the ratings list. Conkwright's co-workers testified that they thought he did a good job, that he did not deserve his ratings, and that he did not deserve to get laid off. We concluded that this co-worker testimony was close to irrelevant, but in dicta in a footnote observed that:

> It is only close to irrelevant because if the ratings were wildly out of line with other indicia of an employee's performance then one may question whether the rating system has a bias in its implementation. But that is not the case here.

Id. at 235 n.4.

As is readily apparent from the language of that footnote, we were there concerned with the *relevance* of "indicia of an employee's performance" in an inquiry as to pretext. We did not there address the *reliability* of co-worker testimony as a means of proving that an employee's work performance was either adequate or that it was equivalent to that of other workers.

Here, we accept that indicia of King's performance might be relevant to the pretext inquiry. But, as explained above, King has not proffered any reliable and admissible testimony as to such indicia, and King cannot qualify the testimony of his co-workers as a reliable assessment of the relative competence of him and his co-workers. The dissent's effort to backdoor the co-worker testimony into the case under *Conkwright* thus fails and King may not ground his proof of pretext on such testimony.

For all the reasons given above, none of the evidence King proffers is sufficiently demonstrative of retaliatory intent to establish that the *unrebutted* poor performance discharge motive is pretext. As a result, King's proffer is insufficient for his action to survive appellee's motion for summary judgment. And while the district court improperly found King not to have made out a prima facie case, it properly granted summary judgment for appellee.

Appendix A

CONCLUSION

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED.

GREGORY, Circuit Judge, concurring in part and dissenting in part:

I join the majority's opinion with respect to King's failure to establish a prima facie case of discriminatory discharge. As the majority finds, King has not adduced sufficient evidence of satisfactory performance vis-a-vis his employer's legitimate expectations to survive summary judgment. Additionally, I concur in the majority's reversal of the district court's conclusion that King failed to make out a prima facie case of retaliatory discharge. However, for the reasons that follow, I dissent from the majority's conclusion that King's allegations of discriminatory treatment are insufficient to create a genuine issue of material fact with respect to pretext.

The majority identifies King's allegations regarding differential and discriminatory treatment at the hands of his employer. The majority then posits that this treatment, even if assumed to be true, fails to contradict the Secretary's proffered discharge motive. To survive summary judgment, however, King need not squarely rebut his employer's explanation. Instead, King must cast sufficient doubt upon the genuineness of the explanation to warrant a jury's consideration of possible alternative and discriminatory motivations for the firing. As a basic proposition, it is not

terribly difficult to imagine a workplace where, confronted with a group of underperforming employees, an employer who is improperly motivated by discriminatory and retaliatory animus, singles out the minority employee for firing after he files a complaint. Because he has made out a prima facie case, if King also has cast doubt upon the real motivations behind his unique treatment, he has adduced sufficient evidence to survive summary judgment.

In *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000), a panel of this Court addressed the exact nature of the evidence necessary to establish pretext. Writing for the Court, Judge Wilkinson noted, "[I]nstead of producing evidence that shows [ ][the employer's] assessment of [ ][the employee's] performance was dishonest or not the *real reason* for her termination — as the law requires — [ ][the employee] disputes the merits of [ ][the] evaluations." *Id.* (emphasis added). In *Hawkins*, the employee simply took issue with the employer's assessment of her performance deficiencies. The Court required that the employee actually offer some evidence suggesting that an alternative reason existed for the termination. In *Hawkins*, beyond the employee's self-serving and conclusory allegations of racism, there was no such evidence. Hence, in reviewing for pretext at the summary judgment stage, we should assess whether the plaintiff has adduced evidence sufficient to create a genuine doubt in the mind of a reasonable jury regarding the veracity of the proffered justification. Our analysis must be limited to whether the evidence is competent and sufficient to create a genuine issue of material fact for the jury to resolve — as opposed to whether the evidence will overcome cross-examination and the rigors of trial to carry a jury. King

maintains that he was treated *differently* than his similarly situated co-employees. To support this proposition, he offers several factual illustrations, which I find genuinely troubling and deserving of a jury's consideration.

In an age in which schools are acutely aware of the dire consequences that may follow from allegations of inappropriate touching of students by teachers, one would expect school administrators to respond rapidly and decisively to any such allegation. Yet, it is precisely in this highly charged context that we observe a case of laissez-faire and differential treatment by the school. Specifically, I am disturbed by the differential treatment of King's white co-worker, Richard Moore, who violated the school's policies by inappropriately poking and tickling students, yet was not terminated, nor even formally written-up for the incident.

The Secretary claims that Moore stopped his objectionable conduct once warned, yet King proffers evidence that undermines this defense. To wit, King offers the testimony of Robert Inaba, whose son Keith had been inappropriately touched by Moore throughout the year. *See* J.A. at 333-334. Inaba brought this conduct, along with other complaints regarding Moore, to the attention of Whitaker during a June 2, 1997 meeting. *Id.* Whitaker acknowledged that another parent had notified him of similar misconduct, and indicated that he had already counseled Moore regarding the inappropriate touching. During the same meeting, once Moore had left the room, Whitaker assured Inaba that, "[Moore] should not have touched any students within the last seven days." *Id.* When Inaba returned home and related Whitaker's assurance that the inappropriate

touching would stop, his son informed him that Moore had touched another student, Damon Dukes, earlier that very day. On the morning of June 3, 1997, Inaba telephoned Whitaker and related his son's report of the ongoing touching, which clearly undermined his assurances. *Id.* Whitaker stated that he would investigate the matter. After follow-up conversations with Whitaker on June 4 and June 6, Inaba reported that Whitaker's investigation of the matter was limited to asking a third-party whether he too had observed the June 2 touching. *Id.* Whitaker did not ask the alleged victim of Moore's conduct about the incident. Finally, frustrated with Whitaker's apparent unwillingness to take his concern seriously, Inaba contacted Damon Dukes' father on June 9. During this conversation, Mr. Dukes confirmed that the touching had occurred sometime during the previous week, although he could not specify precisely when it occurred. *Id.*

The majority argues that to prove that King and Moore were similarly situated for purposes of discipline, King would have to show that Moore's misconduct continued beyond reprimand, which would permit the inference that the administration did in fact know of the continuing misconduct. *Supra* at 9. The majority turns to the Inaba incident discussed above and concludes that it does not demonstrate that the misconduct continued beyond the reprimand. *Id.* at 10. However, this conclusion simply does not follow from the relevant facts. The majority notes that Inaba learned of the incident on June 2 through his son, rather than from Damon Dukes or his father. The majority then acknowledges that Inaba spoke to Mr. Dukes, and confirmed that Damon had been touched. The majority places great emphasis upon its

observation that Mr. Dukes did not indicate that the touching had "occurred *after* the teacher had been reprimanded." *Id.* Finally, the majority notes that neither the victim nor his parent filed a complaint alleging the touching. Hence, according to the majority, there is no basis upon which the inference of knowledge of continued touching may rest.

Indeed, Inaba's letter reports no express confirmation by Mr. Dukes that his son had been touched after the reprimand. However, Inaba's letter does not report that he requested such a confirmation. Indeed, Inaba relates that Mr. Dukes indicated that his son had been touched sometime during the previous week. *See* J.A. at 333. This conversation occurred on June 9, 1997. Hence, we can assume that the touching occurred sometime on or after June 2, 1997. However, on June 2, 1997, Whitaker had assured Inaba that he had already spoken to Moore regarding the touching, and that he should not have touched any student within the last seven days. It is hardly a great leap to infer from this that Whitaker was on notice regarding the reported touching by Moore during late May 1997. Therefore, Inaba's June 3, 1997 report to Whitaker regarding an incident alleged to have occurred on June 2, 1997, establishes that Whitaker was aware of reports of ongoing misconduct by Moore — *post-reprimand.*

This fact establishes a solid basis for the permissible inference, to adopt the majority's logical approach, that the administrators knew that Moore's misconduct continued beyond reprimand, yet failed to discipline him as they would ultimately discipline King. Hence, King has established a genuine issue of material fact warranting a jury's

consideration of differential treatment. The majority validly observes that Inaba's testimony is indirect, that neither Damon Dukes nor his father filed a complaint, and we might well expect the Secretary to present just such a challenge to King's evidence at trial. However, we must limit our inquiry at present to whether King may survive summary judgment, not prognosticate whether his evidence will ultimately sway a jury. King's evidence of the differential treatment vis-a-vis his white colleague alone constitutes sufficient evidence of pretext to deny summary judgment.

However, King offers significant proof beyond the Moore incident from which we may infer that he was treated differently by his employer. For instance, King offers the testimony of Donna Fontenot, a substitute teacher at the school, who testified that she was coerced by Carlson to prepare reviews denigrating the quality of King's lesson plans. *See* J.A. at 381-83. Fontenot testified that she felt pressured, at the risk of losing future teaching assignments, to produce a negative evaluation of King's work. *Id.* The majority dismisses this testimony because it was Whitaker, rather than Carlson, who made the ultimate decision to discharge King. Thus, according to the majority, any unlawful motive that legitimately could be inferred from Carlson's coercive campaign to "paper" the record with negative reviews, cannot serve as a basis for pretext unless King proffers evidence that Fontenot's reviews were false and that he was fired, at least in part, on that basis. *Supra* at 11.

The majority seems to assume that Fontenot's reviews should be read independently of the circumstances under which they were produced. By insisting that King

demonstrate that Fontenot's reviews "falsely attributed sub-par performance to him," *supra* at 11, the majority returns again to its insistence that King demonstrate the merits of his performance. However, as noted above, King need not squarely rebut his employer's performance-based explanation. Instead, he must introduce evidence casting doubt upon the proffered explanation. It is to this end that Fontenot's testimony should be directed. That a teacher was coerced to denigrate the work of her colleague, contrary to her true impressions and beliefs, must at least raise genuine issues concerning the credibility of Carlson's putative meritocractic zeal. Although Carlson did not make the ultimate decision to fire King, these coerced reviews were part of King's teaching record. Of course, as the majority emphasizes, Whitaker asserts that he discharged King after conducting his own independent investigation of the case. However, a jury need not blindly accept this version of events, and may rightfully infer that Whitaker's decision may have been tainted by Carlson's misconduct — evidence of which abounds. The Fontenot testimony reveals differential treatment, whereupon a jury may legitimately discount the reviews as a pretext for the employer's true unlawful motive.

Finally, the majority dismisses King's proffer of co-worker testimony regarding the similarity of his work to their own. According to the Court, King may only establish the equivalence of his work by introducing expert testimony to this effect. *Supra* at 11, I agree with the majority that King would require expert testimony to establish that his work met the legitimate expectations of his supervisor; however, it hardly follows *a fortiori* that he must adduce expert testimony to demonstrate the *similarity* of his work product to that of his co-workers.

As we have recognized, "[A] lay witness in a federal court proceeding is permitted under Fed. R. Evid. 701 to offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived." *MCI Telecommunications Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990) (quoting *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399, 403 (3d Cir. 1980)). Although lay opinion testimony was once disfavored and presumed excludable, "The modern trend favors the admission of opinion testimony, provided that it is well-founded on personal knowledge [as distinguished from hypothetical facts] and susceptible to specific cross-examination." *Id.* (alteration in original) (quoting 3 J. Weinstein, Evidence ¶ 701[02] at 701-9 and 701-17 (1978)). However, the testimony of such a witness is limited to those opinions or inferences which are: 1) rationally based upon the perception of the witness; 2) helpful to a clear understanding of the testimony or the determination of a fact in issue; and 3) not based upon knowledge within the scope of Rule 702. Fed. R. Evid. 701. Additionally, we must be on guard to prevent lay opinion testimony when it involves "meaningless assertions which amount to little more than choosing up sides." *Mattison v. Dallas Carrier Corp.*, 947 F.3d 95, 110-11 (4th Cir. 1991) (quoting Fed. R. Evid. 701, Advisory Committee Note).

Although the contours of Rule 701 might upon first inspection appear straight-forward, considerable subtlety is often required to avoid the mischaracterization of competent lay opinion. *See, e.g., MCI Telecommunications*, 897 F.2d at 706 (citing district court's error in treating proper lay opinion as expert testimony where witness offered profit projections based upon her personal knowledge of company's books);

Winant v. Bostic, 5 F.3d 767, 772 (4th Cir. 1993) (noting that sometimes the characterization of testimony as opinion evidence may be misleading when the focus should be upon rational inferences drawn from facts of which the witness has personal knowledge). Accordingly, courts have admitted lay opinion testimony under Rule 701 that goes well beyond the classic confines of physical perception, and which requires the exercise of judgment solidly grounded in personal knowledge. *See, e.g., United States v. Fowler*, 932 F.2d 306, 312 (4th Cir. 1991) (admitting lay opinion that defendant knew rules about treatment of classified documents, upon foundation that witnesses were familiar with the documents, their classification and reasons therefor, and the nature of the defendant's work); *MCI Telecommunications*, 897 F.2d at 706 (profit projections based upon personal knowledge of company's finances admissible under Rule 701); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (upholding admission of lay opinion from plaintiff's owner as to damages, which was based upon personal knowledge and participation in affairs of business, even if witness relied in part upon report prepared by outside accountant in preparing opinion); *United States v. Westbrook*, 896 F.2d 330, 335-336 (8th Cir. 1990) (permitting ex-users to testify as to the identity of a controlled substance based upon their past experience with same). What we may derive from these cases is that the opinion testimony is not admitted due to the "specialized knowledge," which should be reserved for experts under Rule 702, but because of the particularized knowledge of a witness by virtue of his personal experience in a field (legal or not).

Appendix A

The majority's treatment of the distinction between lay and expert opinion does not do justice to the subtleties of the problem. The majority oversimplifies this evidentiary issue when it asserts that King would require an expert witness to "form an opinion based on reasoned analysis as to how King and the other teachers were performing and as to how their performances measured against one another." *Supra* at 11. King has adduced substantial evidence from his fellow teachers to the effect that their lesson plans were similar. Each of these teachers and substitute teachers had ample personal knowledge of the subject matter. To allow one teacher to introduce the opinion that his or her colleague's lesson plan "looks similar," as so many of King's co-workers have testified, would hardly hazard setting Rule 701 adrift from its prudential moorings. If a business owner or bookkeeper, testifying as a lay opinant, may offer such seemingly "specialized" insights as profit projections and damage reports, surely an elementary school teacher can compare two lesson plans, of which he or she has personal knowledge, without qualifying as an expert. Likewise, if an amphetamine aficionado may offer lay opinion comparing powdery substances of unknown provenance, I do not see why a teacher must be treated as an expert to compare the appearance of similar lesson plans. Ultimately, King's proffer of comparative testimony goes not to the merits of the subject work-product, nor to the legitimate expectations of an elementary school supervisor, but simply seeks to establish the similarity of two items of evidence, both of which are personally familiar to the proposed opinant. Therefore, our analysis of pretext should proceed upon the premise that King has demonstrated a genuine factual question as to whether his work-product is comparable to that of his colleagues.

The ultimate determination of equivalence, of course, should be reserved for the jury.

Finally, I would take this opportunity to comment upon this Circuit's precedent, which has been cited by the majority to emphasize our traditional reluctance to employ the testimony of co-workers to establish performance merit in unlawful discharge cases. *Supra* at 5. Indeed, as the majority correctly explained, an employee may not introduce the testimony of his co-workers to establish his satisfaction of his supervisor's legitimate performance expectations. *See Hawkins*, 203 F.3d at 280; *Tinsley*, 155 F.3d at 444. I joined the majority's opinion regarding King's discriminatory discharge claims precisely in light of such precedent. However, we are now forced to resolve a separate question altogether: does King's evidence of comparable work product demonstrate differential treatment by his employers?

The opinion testimony of King's peers establishes a genuine question of fact regarding the equivalence of his work product to that of his peers. This evidence does not establish that his work was meritorious, nor could it under our precedent. We have had occasion, in noting the narrow relevance of co-worker testimony regarding the quality of a plaintiff's work product, to allow for the admission of such opinion in order to demonstrate the possibility of implementation bias in an otherwise objectively designed review scheme. *See Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 235 n.4 (4th Cir. 1991). In *Conkwright*, we acknowledged that an "objective" employee rating system, might be manipulated to generate a neutral looking basis for discharge. In such a scenario, where co-workers testified that

the employee did not deserve the ratings he received, we observed that their testimony could be relevant to an argument of pretext. The majority concedes that such "indicia of King's performance might be relevant to the pretext inquiry," *supra* at 12, but goes on to conclude that King failed to proffer admissible testimony as to such indicia. Obviously, in light of my discussion of Rule 701, I disagree with this assessment. King's co-workers' testimony is an indicator of the equivalence of his performance, and lays the foundation for the inference that by being singled out for discharge, he was treated differently on the basis of race, rather than performance.

Ultimately, we must recall that we are asked to assess whether King has raised a genuine issue of material fact on the question of pretext. On my review of the evidence, I cannot escape the conclusion that he has done so. I therefore respectfully dissent from the part of the majority's opinion affirming the district court's summary judgment on King's retaliatory discharge claim.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED FEBRUARY 21, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action 01-1152-A

Alexandria Division

ALFRED G. KING,

Plaintiff,

v.

DONALD H. RUMSFELD, Secretary of Defense

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on Defendant's Motion for Summary Judgment.

The Plaintiff, a 52 year old African-American male, was hired in 1996 by the Department of Defense Dependents Schools (hereinafter "DoDDS") to teach at E.J. King High School in Sasebo, Japan. The Plaintiff began work at the DoDDS school in September 1996 as a civilian first year probationary math and science teacher, and was terminated by the school's principal on May 29, 1997 through a Notice

of Termination which was effective June 12, 1997. The Plaintiff's Complaint contains three counts alleging he was discriminated against based on his race (Count II) and sex (Count IV), and that his employment was terminated in retaliation for his filing of a complaint about the alleged discrimination with the Department of Defense Office of Complaint Investigations (Count V).[1]

The Plaintiff claims that as one of four African Americans employed at the school, and the only African American male, he was "unfairly singled out" by Principal Thomas Whitaker (hereinafter "Whitaker"), a Caucasian male, and Assistant Principal Douglas Carlson (hereinafter "Carlson"), a Caucasian male, for more frequent classroom monitoring and observation than other probationary teachers, for more frequent reviews of lesson plans than other probationary teachers, and for more scrutiny than other probationary teachers. He claims that he was the only probationary teacher assigned a permanent substitute teacher, and this was done so Carlson could monitor any differences in the Plaintiff's classroom with a substitute teacher, and personally review the lesson plans the Plaintiff left for the substitute teacher. The substitute teacher was asked by Carlson to produce the lesson plans left for her by the Plaintiff, but not when she substituted for other teachers. She found the Plaintiff's lesson plans to be far more detailed than her own.

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1. This Court dismissed Plaintiff's claims of race discrimination under 42 U.S.C. Sec. 1981 (Count I), racial harassment (Count III), and disability discrimination (Count VI) in an order dated December 3, 2001.

Appendix B

The Plaintiff asserts that Carlson called the Plaintiff's students out of his classroom and probed them for negative information on the Plaintiff and his teaching methods. He was criticized by Carlson for his teaching style, but his peers observed his teaching methods and found him to be "an effective teacher [who] worked well with his students." Lastly, the Plaintiff claims that Carlson seemed to have problems interacting with males and African Americans, and when the Plaintiff told Carlson he was filing a discrimination complaint, Carlson responded, "That's what you people always say when you screw up."

In early November 1996, Whitaker held a counseling session with the Plaintiff to discuss a report that the Plaintiff used profanity on the school grounds and a report that the Plaintiff called his students "stupid." After the December school holiday in 1996, Whitaker left the school on a temporary medical leave and Carlson became responsible for teacher evaluation as an acting principal. Carlson continued the teacher evaluation procedures of formal classroom observations, as well as informal observations in the classroom, hallways and at school activities.

In January 1997, after meeting with the students involved, Carlson met with the Plaintiff to discuss two classroom incidents and then wrote a memorandum to the Plaintiff documenting the two incidents that were discussed: (1) an embarrassing and belittling statement made by the Plaintiff about a student in his classroom, and (2) a communication made by the Plaintiff calling a student "stupid." The Plaintiff admitted the first incident, but denied the second incident and listened to recommendations on how

to avoid such incidents in the future. Also in January 1997, Carlson met with the Plaintiff to discuss his concerns and to offer suggestions with regard to the lesson plans the Plaintiff left for his substitute teacher to use in his absence. Carlson then wrote up a memorandum about the meeting. Carlson made a habit of observing classes with substitute teachers to ensure the class was on task and if the students were wasting time, he would ask the substitute teacher for the lesson plans left by the teacher.

During his tenure as acting principal, Carlson became concerned with various aspects of the Plaintiff's performance and believed his classes lacked focus and productivity. Throughout the winter of 1997, Carlson met with the Plaintiff to discuss his classroom instruction, reports of the Plaintiff being late to class, leaving the classroom during class time and smoking in front of students. Carlson saw no correction in the Plaintiff's behavior during the course of the school year. On March 10, 1997, Carlson met with the Plaintiff to discuss his classroom observations of March 6, 1997, and a complaint by students that the Plaintiff was making students put their nose in a circle on the blackboard as punishment. On March 14, 1997, Carlson again met with the Plaintiff to discuss his unsatisfactory performance. During the meeting, the Plaintiff became upset and left the meeting, so upon agreement of the parties Carlson set forth his comments in a memorandum dated March 21, 1997. Before the Plaintiff left that meeting, Carlson informed the Plaintiff that based upon his current level of performance, he could be terminated before the end of the 1996-1997 school year. On March 24, 1997, Carlson issued a Memorandum for the Record concerning the Plaintiff's unacceptable lesson plans left

for his substitute teacher. Shortly thereafter, a second memorandum was issued concerning reports that the Plaintiff was telling his students, "You can't do or say anything to get me fired."

Carlson found the Plaintiff's teaching skills to be deficient, and his overall performance to be unsatisfactory. At the same time, he became aware of some discrepancies in the Plaintiff's Living Quarters Allowance form and his teaching application. With the knowledge that the Plaintiff was in his first year of his two year probation which gives the DoDDS more flexibility to terminate a teacher because probationary teachers are not afforded the same level of protection that is given to tenured teachers, Carlson contacted Whitaker about terminating the Plaintiff. Whitaker decided to perform his own evaluation upon his return from medical leave. Shortly after Whitaker's return to the school, approximately April 1, 1997, the two men reviewed the Plaintiff's personnel file. Whitaker met twice with the Plaintiff to afford him an opportunity to explain his performance. Whitaker then performed two regular classroom observations and a number of unannounced visits, and afterwards made recommendations to the Plaintiff about his teaching methods. Whitaker also expressed concern to the Plaintiff about his use of profanity in the classroom. After his independent evaluation, and based on Carlson's observations, Whitaker decided to terminate the Plaintiff's employment due to his unsatisfactory performance and issued a Notice of Termination During Trial Period to the Plaintiff on May 29, 1997 to be effective at the end of the 1996-1997 school year. The Plaintiff left before the end of the school year.

Appendix B

The Plaintiff initially contacted the Department of Defense Office of Complaint Investigations on March 14, 1997, and formally filed a discrimination complaint with the office on October 14, 1997. The Plaintiff filed this Complaint on June 7, 2000.

Summary judgment is appropriate where there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56 (c). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *See Id.* Mere speculation by the non-moving party "can not create a genuine issue of material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *See Also Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party. *See Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996).

To establish a claim of disparate treatment, (1) the Plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence; and (2) if the Plaintiff can establish a prima facie case, the burden then shifts to the Defendant who must articulate a legitimate, non-discriminatory reason for the challenged action; *See Texas Dep't of Community*

Affairs v. Burdine, 450 U.S. 248, 253 (1981); and (3) if the Defendant can do so, the burden then shifts back to the Plaintiff to demonstrate that the Defendant's proffered reason is false. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). To prove discriminatory termination under Title VII, the Plaintiff must offer proof of the following elements: (1) that the Plaintiff is a member of a protected class; (2) that he was qualified for his job and his job performance was satisfactory; (3) that in spite of his qualifications and performance, he was fired; and (4) that the position remained open to similarly qualified applicants after his dismissal. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 (4th Cir. 1989 citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The Plaintiff as an African American male meets the first prong of the discriminatory termination test, but fails to meet the second or third prongs due to his unsatisfactory performance in his job. The Plaintiff has presented no evidence that his job performance was satisfactory at the time of termination. Furthermore, the Plaintiff cannot provide direct or indirect evidence of discriminatory discharge. The Plaintiff did not meet his supervisors' performance standards and did not correct behaviors that were admonished by his supervisors (e.g. calling his students "stupid," using profanity in the presence of students, smoking on school grounds). Title VII does not "require an employer to adopt a life of economic altruism and thereby immunize protected class members from discharge or demotion despite their poor performance and inadequate qualifications. Rather the anti-discrimination remedies [available] merely preclude an employer from treating some employees less favorably than others 'because of' their race or some other similarly impermissible

characteristic." *Gairola v. Commonwealth of Virginia, Dep't of General Services*, 753 F.2d 1281 (4th Cir. 1985).

Although the Plaintiff was subjected to several hours of classroom observation and performance evaluations by the Principal and the Assistant Principal, so were his peers. It is the job of a Principal or Assistant Principal to work with all teachers to improve their job performance, and more frequent observation may be necessary with new teachers or those who are not performing at a satisfactory level. The Plaintiff was subjected to the same standards for performance evaluation as those for other probationary and tenured teachers, but due to the Plaintiff's inability to improve or take suggestion for improvement, closer scrutiny by the Principal and Assistant Principal was warranted. *See Hawkins v. Pepsico Inc.*, 203 F.3d 274, 282 (4th Cir. 2000); *See Also Johnson v. Merrell Dow Pharms., Inc.*, 965 F.2d 31, 34 (5th Cir. 1992) ("In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees."). Although the Plaintiff argues that many of his peers found his lesson plans to be adequate and his teaching methods to be satisfactory, it is not for his peers to judge his job performance, but it is for his supervisors to judge. The Plaintiff argues that a Caucasian male probationary teacher was treated more favorably when a parent complained about his performance. The Defendant discussed the parent complaint with the teacher and the behavior stopped and never reoccurred. This situation stands in contrast to the Plaintiff's situation where poor performance was not improved and behaviors were not corrected. The Plaintiff's supervisors have the responsibility of running the school and ensuring the teachers perform at a satisfactory

level. To do so a supervisor must have the ability to assess employees' performance and terminate employees that do not perform at the expected level. The Plaintiff presents no evidence he was treated any differently than other similarly situated employees and can not establish a prima facie case.

Finally, the Plaintiff has failed to come forward with evidence to prove his retaliation claim. To establish a prima facie claim of retaliation, the Plaintiff must prove that: (1) he engaged in a protected activity; (2) his employer took an adverse employment action against him; and (3) a causal connection existed between the protected activity and the asserted adverse action. *See von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). The Plaintiff claims that school administrators terminated his employment in retaliation for his filing a discrimination complaint. Whitaker knew of the Plaintiff's discrimination complaint to the Department of Defense Office of Complaint Investigations when he terminated the Plaintiff, but he terminated the Plaintiff based on his overall performance which included inadequate plans for substitute teachers, unsatisfactory lesson plans, use of profanity in class and his general observations that the Plaintiff was below average as an educator. "[M]ere knowledge on the part of the employer that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging an employee." *Williams v. Cerberonics, Inc.*, 871 F.2d 452 (4th Cir. 1989). Here, the evidence shows that Whitaker had legitimate performance concerns about the Plaintiff and terminated his employment based on his unsatisfactory performance. Furthermore, Carlson counseled the Plaintiff, prior to the Plaintiff's filing

the complaint, that his termination was possible if his performance did not improve. For these reasons, the Court finds no evidence to support a claim of retaliatory discharge.

Accordingly, summary judgment should be granted on all grounds and this case should be dismissed.

An appropriate order shall issue.

s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

February 21, 2002

Supreme Court, U.S.
FILED
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No. 03-197

In the Supreme Court of the United States

ALFRED G. KING, PETITIONER

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether testimony of petitioner's co-workers comparing their work to petitioner's work was insufficient to demonstrate that petitioner met the employer's legitimate job performance expectations.

2. Whether witnesses who testify about an employer's legitimate job performance expectations, or who compare the performance of different employees in light of such expectations, must be certified as experts.

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No. 03-197

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DONALD RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 328 F.3d 145. The memorandum opinion of the district court (Pet. App. 29a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2003. The petition for a writ of certiorari was filed on August 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, the Department of Defense Dependent Schools hired petitioner to teach math and science to eighth and ninth graders at the E.J. King School in

Sasebo Japan. Pet. App. 2a, 29a. Petitioner was subject to a two-year probationary period. *Ibid.*

During his probationary period, petitioner's supervisors counseled him on numerous occasions for using profanity around the students and belittling them. Pet. App. 2a. For instance, in early November 1996, school principal Thomas Whitaker held a counseling session with petitioner to discuss a report that petitioner had used profanity on school grounds and had called his students "stupid." *Id.* at 31a. Whitaker went on medical leave after the fall term, and Douglas Carlson became acting principal. *Ibid.*

During his tenure as acting principal, Carlson also became concerned about petitioner's performance. Pet. App. 2a. For instance, petitioner left identical worksheets for three different classes at different grade levels when he had to be absent. *Id.* at 2a n.1. Carlson believed that petitioner's practice reflected inadequate preparation, and Carlson offered suggestions about how petitioner could improve his performance. *Id.* at 2a n.1, 3a. Carlson also met with petitioner to discuss reports that petitioner was smoking in front of students and was using inappropriate methods of discipline, such as forcing his students to put their nose in a circle on the blackboard. *Id.* at 32a.

On March 14, 1997, Carlson held a meeting where he informed petitioner that his performance put him at risk of being terminated. Pet. App. 32a. On the same day, petitioner contacted the Department of Defense Office of Complaint Investigations to discuss claims of discrimination. *Id.* at 34a.

In early April, after Whitaker returned from medical leave, Whitaker met with Carlson to discuss Carlson's concerns about petitioner's performance. Pet. App. 33a. As a result of the meeting, Whitaker began his own

independent investigation of petitioner, which included two regular observations and several unannounced visits to petitioner's class. *Ibid.*

During that process, Whitaker made recommendations to petitioner about his teaching methods and expressed concern regarding his use of profanity in the classroom. Pet. App. 33a. Ultimately, based on his own observations, Whitaker decided to terminate petitioner for unsatisfactory performance. *Ibid.* Petitioner received notice of his termination on May 29, 1997. *Id.* at 29a-30a.

2. Petitioner filed suit against Donald H. Rumsfeld (respondent), alleging that he was discharged on the basis of race and gender, and in retaliation for his complaints about discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), 2000e-3. Pet. App. 1a-2a. The district court granted summary judgment for respondent. *Id.* at 29a-38a.

The district court found that petitioner failed to submit sufficient evidence to establish a prima facie case of discrimination because he failed to submit sufficient evidence that his job performance was satisfactory at the time of his discharge. Pet. App. 35a. The district court also determined that petitioner failed to establish a prima facie case of retaliatory discharge. *Id.* at 37a-38a.

3. The court of appeals affirmed. Pet. App. 1a-28a. The court first held that petitioner failed to establish a prima facie case of discriminatory discharge because he had not introduced sufficient evidence that he was performing satisfactorily at the time of his discharge. The court of appeals observed that the government "offered substantial evidence that [petitioner] was not in fact meeting legitimate job performance expecta-

tions, chronicling [petitioner's] poor performance and his supervisors' numerous concerns." *Id.* at 5a. Petitioner's response, the court noted, "is limited to his own claim of satisfactory job performance and to testimony he elicited from his fellow teachers to the effect that his lesson plans were substantially comparable to their own." *Ibid.* The court concluded that "[n]either testimony can sustain a challenge to appellee's proffer that [petitioner] was not in fact meeting *appellee's* legitimate performance expectations." *Ibid.* Addressing the testimony of petitioner's co-workers, the court explained that "[p]roof that [petitioner's] performance was comparable to his co-workers' is *not* proof that [petitioner's] performance met appellee's legitimate job performance expectations. It is *only* proof that his work looked like that of his co-workers, a fact that, without more, does not bear on the critical inquiry." *Id.* at 6a.

The court rejected petitioner's contention that, if his evidence was insufficient to establish satisfactory performance, an employee would only be able to make that showing when an employer concedes satisfactory performance or the employee has positive performance reviews. Pet. App. 6a-7a. The court noted that "[f]or [petitioner] to establish that his work met appellee's legitimate job performance expectations he had only to offer qualified expert opinion testimony as to (1) appellee's legitimate job performance expectations and (2) analysis and evaluation of [petitioner's] performance in light of those expectations." *Id.* at 7a. The court concluded that it "is not inconceivable that [petitioner's] co-workers could qualify as expert witnesses to testify as to their employer's legitimate job performance expectations and as to their own analysis and

evaluation of [petitioner's] performance in light of those expectations." *Ibid.*

The court further explained that the co-worker testimony offered by petitioner "was limited to the fact observation that [petitioner's] lesson plans looked like theirs, and, arguably, to the fact that *they* believed [petitioner's] work met appellee's expectations." Pet. App. 7a. The court then concluded: "Failing to address what expectations of [petitioner] appellee could legitimately maintain and failing to analyze [petitioner's] work in light of such opined expectations, the co-workers' fact testimony cannot build a prima facie case for [petitioner]." *Ibid.*

The court of appeals next held that petitioner had submitted sufficient evidence to establish a prima facie case of retaliatory discharge. Pet. App. 9a. The court observed, however, that the government had proffered a legitimate, non-discriminatory motive for petitioner's discharge—"that [petitioner] was not meeting appellee's job performance expectations." *Id.* at 10a. The court further concluded that petitioner had failed to show that the government's proffered motive was pretextual. *Id.* at 10a-16a.

The court of appeals rejected petitioner's reliance on evidence that a white employee who engaged in misconduct was not fired, since petitioner did not rebut the government's showing that school officials believed that the other employee (unlike petitioner) had ceased his misconduct after receiving a warning. Pet. App. 10a-13a. The court found that petitioner's evidence regarding Carlson's alleged hostility to him was insufficient to overcome summary judgment, since it was Whitaker who fired petitioner after conducting his own independent investigation. *Id.* at 13a-14a. Finally, the court held that petitioner's co-worker testimony did not

show that he was treated differently from similarly situated individuals. *Id.* at 14a-15a. The court concluded: "For [petitioner] to prove that he was similarly situated to his colleagues in terms of his job performance would, in the absence of evidence to that effect from the employer or its job performance reviews, require an expert to form an opinion based on reasoned analysis as to how [petitioner] and the other teachers were performing and as to how their performances measured against one another." *Id.* at 14a.

Judge Gregory concurred in part and dissented in part. Pet. App. 17a-28a. He agreed with the majority that petitioner failed to establish a prima facie case of discriminatory discharge, but disagreed with the majority's holding that petitioner's evidence was insufficient to create a question of material fact on petitioner's claim of retaliatory discharge. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-19) that the court of appeals erred in holding that testimony from petitioner's co-workers was insufficient to establish that he met the employer's legitimate expectations. That contention is without merit and does not warrant review.

a. As the court of appeals explained, petitioner's co-workers' testimony was limited to their observation that petitioner's lesson plans looked like their plans. The co-workers did not address whether those plans met the employer's legitimate performance expectations or even what those expectations were. The court of appeals therefore correctly concluded that the testimony of petitioner's co-workers was insufficient to show that petitioner was performing his job satisfactorily.

Petitioner contends (Pet. 12) that the court of appeals held that *all* lay co-worker testimony is irrelevant to the existence of a prima facie case as a matter of law. The court's decision, however, rests on the narrower ground that co-worker testimony that does nothing more than compare one aspect of a plaintiff's performance with that of his co-workers—without reference to the employer's legitimate job performance expectations—is insufficient establish a prima facie case. See Pet. App. 6a ("Proof that [petitioner's] performance was comparable to his co-workers is *not* proof that [petitioner's] performance met appellee's legitimate job performance expectations."); *id.* at 7a (noting that "testimony as to the fact that [petitioner's] work looked like that of his co-workers, or even as to the fact that they believed his work met appellee's expectations, does not establish what expectations appellee could legitimately have"). That holding is sound and does not warrant this Court's review.

b. Petitioner errs in contending (Pet. 12-17) that the court's holding on the deficiency of his co-workers' testimony conflicts with decisions from other circuits. None of the cases cited by petitioner hold that testimony that compares the employee's work with that of his co-workers, without addressing the employer's legitimate expectations, is sufficient to overcome a motion for summary judgment.

Several of the cases cited by petitioner do not even involve co-worker testimony. One case held that long tenure at a position can be sufficient to establish satisfactory performance. *Damon* v. *Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999), cert. denied, 529 U.S. 1109 (2000). Another assumed arguendo that such a showing would be sufficient. *Young* v. *General Foods Corp.*, 840 F.2d 825,

829 n.3, 830 (11th Cir. 1988). Another case held that an employer's reasons for discharge should not be considered when analyzing whether the employee has established a prima facie case. *Siegel* v. *Alpha Wire Corp.*, 894 F.2d 50, 54 (3d Cir.), cert. denied, 496 U.S. 906 (1990). Another case held that the testimony of a customer, an employee's positive performance evaluations, and a previous supervisory recommendation were sufficient to establish an employee's satisfactory job performance. *Lyoch* v. *Anheuser-Busch Cos.*, 139 F.3d 612, 615-616 (8th Cir. 1998). One case did not explain the basis for its conclusion that the employee had established a prima facie case, but ruled for the employer based on evaluations made by the employer's president. *Valdez* v. *San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992). And several cases involved the extent to which an employee's own testimony may be used to establish that the employee satisfied the employer's legitimate performance expectations. See *Bullington* v. *United Air Lines, Inc.*, 186 F.3d 1301, 1316 (10th Cir. 1999); *Rush* v. *McDonald's Corp.*, 966 F.2d 1104, 1114 (7th Cir. 1992); *MacDonald* v. *Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1119 (10th Cir. 1991); *Williams* v. *Williams Elecs., Inc.*, 856 F.2d 920, 923 n.6 (7th Cir. 1988); *Bienkowski* v. *American Airlines, Inc.*, 851 F.2d 1503, 1507 (5th Cir. 1988); *Yarbrough* v. *Tower Oldsmobile, Inc.*, 789 F.2d 508, 512 (7th Cir. 1986).

The decisions cited by petitioner that rely on co-worker testimony did not address whether co-worker testimony is sufficient when it fails to assess the employee's performance in light of the employer's legitimate expectations. That issue simply did not surface in those cases. The reliance on co-worker testimony in

those cases therefore does not conflict with the decision below.

Furthermore, the co-worker cases involved circumstances that are markedly different from the circumstances presented here. In *Kenworthy* v. *Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992), the court accepted testimony from *supervisory* personnel on the plaintiff's qualifications. In *Campbell* v. *Dwyer Products Corp.*, No. 01-2134, 2002 WL 337324, at *2 (7th Cir. Feb. 27, 2002) (31 Fed. Appx. 916, 918 (unpublished order)), the prima facie case consisted of the plaintiff's record of "positive feedback" from the employer as well as testimony from co-workers that another employee was responsible for sub-standard work attributed to the plaintiff. And in *Taylor* v. *Philips Industries, Inc.*, 593 F.2d 783, 786 (7th Cir. 1979), in addition to co-worker testimony, there was evidence that the plaintiff performed the same duties as her successors, but was paid less.

Thus, none of the cases cited by petitioner establishes that co-worker testimony that compares the plaintiff's work with that of his co-workers, without regard to whether any of the work met the employer's legitimate expectations, is sufficient to establish the employee's satisfactory performance of the job. There is therefore no conflict between those decisions and the decision below.

c. Petitioner similarly errs in contending (Pet. 17) that the court of appeals' decision makes it impossible for a plaintiff to establish that he met the employer's legitimate expectations absent positive performance reviews or the employer's concession. Under the court of appeals' decision, a plaintiff can obtain information through discovery regarding the employer's performance expectations and tailor the presentation of

evidence to address those expectations. Indeed, in the present case the employer maintained a Performance Appraisal Plan outlining the standards each employee must meet. C.A. App. 1058. Because petitioner's witnesses failed to tailor their testimony to those standards, the court of appeals correctly concluded that their testimony failed to establish a prima facie case.

d. Certiorari is also unwarranted on the first question presented by petitioner because there is an independent basis for the court of appeals' affirmance of the grant of summary judgment. As the court of appeals correctly held, petitioner did not meet his burden of showing that the legitimate non-discriminatory reasons offered by the government for his dismissal were a pretext for discrimination.

The government proffered evidence that petitioner was discharged not merely for deficient lesson plans, but for improper conduct such as belittling students and smoking in front of them. As the court of appeals recognized, petitioner did not show that those reasons were pretextual. Petitioner's evidence that his lesson plans were similar to those of other teachers did nothing to show that the decision to fire him for belittling students and smoking in front of them was pretextual. Petitioner was not similarly situated to a white employee who engaged in misconduct because, unlike petitioner, that employee changed his behavior after being reprimanded. And petitioner's evidence that the acting principal did not like him did not demonstrate pretext because the official who fired him based his decision on his own independent investigation and did not rely on the testimony of the acting principal.

2. Petitioner contends (Pet. 20) that the court of appeals erred in holding that, absent an employer's

concession or successful performance reviews, a plaintiff can establish satisfactory job performance by introducing expert testimony. That contention reflects a misreading of the court's decision. The court of appeals did not hold that the *only* way to prove satisfactory job performance is through expert testimony. Rather, the court held that, when a plaintiff wishes to put on a witness to provide *an opinion* on whether the plaintiff met the employer's legitimate performance expectations, that witness should be certified as an expert. Employees remain free to put on evidence from employer manuals, bulletins, and other documents, to establish the employer's expectations.

The court's more limited holding does not warrant review. First, as discussed above, the court of appeals held that petitioner's co-worker evidence was deficient not only because it did not take the form of expert testimony, but also because it was not tailored to the government's legitimate job expectations. Because the latter holding is sufficient to sustain the judgment, this case is not an appropriate vehicle for addressing the court's holding with respect to expert testimony.

Second, the court's conclusion concerning the need for expert testimony does not raise any significant barrier to a plaintiff's ability to establish a prima facie case. To qualify co-workers as experts, a plaintiff need only show that the co-workers have a sufficient degree of knowledge of the employer's legitimate job performance expectations and that they are competent to offer an opinion as to whether the employee met those expectations. That requirement is hardly onerous. The court's conclusion that co-workers must be qualified as experts is therefore not of sufficient importance to warrant review by this Court.

Third, the court's holding does not conflict with a decision from any other circuit. While petitioner asserts that no other circuit has established such a requirement, he does not cite any case that affirmatively rejects such a requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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